LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 7 1972
E. ROBERT SEAVER, CLERK

No. 71-995

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARVEY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-995

HARVEY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action to recover back military pay by a former enlistee in the United States Air Force.

Petitioner was granted a general discharge from the Air Force, effective September 23, 1948. In 1965, he applied to the Air Force Board for the Correction of Military Records for a change in his records to reflect an honorable discharge. On May 3, 1967, the Under Secretary of the Air Force directed that petitioner's military records be corrected to show that he was granted an honorable discharge on October 16, 1948, the date that his enlistment would have terminated had he not received the general discharge. Petitioner was fully compensated through October 16, 1948.

Petitioner instituted the present suit in the Court of Claims to recover pay and allowances as a member

of the military from October 16, 1948 through May 3, 1967. The Court rejected petitioner's contention and dismissed the suit (Pet. App. A.).

1. The decision below is correct. It has been consistently held that an illegally discharged serviceman is entitled to recover pay and allowance only to the date on which his term of enlistment would otherwise have expired. *Conn* v. *United States*, 376 F. 2d 879 (Ct. Cl.); *Middleton* v. *United States*, 170 Ct. Cl. 36; *Sofranoff* v. *United States*, 165 Ct. Cl. 470; *Clackum* v. *United States*, 161 Ct. Cl. 34; *Murray* v. *United States*, 154 Ct. Cl. 185.

2. Petitioner's reliance on *Bell* v. *United States*, 366 U.S. 393, is misplaced. In *Bell*, unlike the instant case, former prisoners-of-war sued for accrued pay from the time of their capture to the date of their discharge. The court merely held that under 37 U.S.C. 242—a statute that is not relevant to the present case—all prisoners of war are entitled to receive pay during captivity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972